ROSMAH MANSOR v. PP

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMED ZAINI MAZLAN J
[CRIMINAL APPLICATION NOS: W-44-114-05-2021
& WA-44-117-05-2021]
24 SEPTEMBER 2021

CRIMINAL PROCEDURE: *Prosecution – Prosecuting officer – Senior Deputy Public Prosecutor ('Senior DPP') – Appointment of advocate and solicitor as Senior DPP – Challenge against validity of appointment – Appointment made pursuant to s. 376(3) of Criminal Procedure Code ('CPC') – Whether advocate 'fit and proper person' – Whether to be gazetted – Whether appointment must be evidenced in writing – Whether s. 376(3) distinct from ss. 377 and 379 of CPC – Whether provisions under ss. 376(3), 377, 378 and 379 of CPC ought to be viewed holistically – Whether criminal prosecution remained under purview and control of Public Prosecutor – Whether there was necessity for first or second written fiat to be issued – Whether Public Prosecutor empowered to make advocate's appointment with retrospective effect – Whether application for trial to be declared a nullity must fail – Interpretation Acts 1948 and 1967, s. 50(b)*

CRIMINAL PROCEDURE: *Public Prosecutor – Powers and functions – Attorney General in capacity as Public Prosecutor appointed advocate and solicitor as Senior Deputy Public Prosecutor ('Senior DPP')– Appointment made pursuant to s. 376(3) of Criminal Procedure Code ('CPC') – Whether advocate 'fit and proper person' – Whether to be gazetted – Whether appointment must be evidenced in writing – Whether s. 376(3) distinct from ss. 377 and 379 of CPC – Whether provisions under ss. 376(3), 377, 378 and 379 of CPC ought to be viewed holistically – Whether criminal prosecution remained under purview and control of Public Prosecutor – Whether there was necessity for first or second written fiat to be issued – Whether Public Prosecutor empowered to make advocate's appointment with retrospective effect – Whether application for trial to be declared a nullity must fail – Interpretation Acts 1948 and 1967, s. 50(b)*

CRIMINAL PROCEDURE: *Trial – Proceedings – Application to declare trial null and void – Challenge against validity of appointment of advocate as Senior Deputy Public Prosecutor ('Senior DPP') – Appointment made pursuant to s. 376(3) of Criminal Procedure Code ('CPC') – Whether advocate 'fit and proper person' – Whether to be gazetted – Whether appointment must be evidenced in writing – Whether s. 376(3) distinct from ss. 377 and 379 of CPC – Whether provisions under ss. 376(3), 377, 378 and 379 of CPC ought to be viewed holistically – Whether criminal prosecution remained under purview and control of Public Prosecutor – Whether there was necessity for first or second written fiat to be issued – Whether Public Prosecutor empowered to make advocate's appointment with retrospective effect – Whether application for trial to be declared a nullity must fail – Interpretation Acts 1948 and 1967, s. 50(b)*

The applicant was facing three charges under s. 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 at the High Court. She was charged for soliciting RM187,500,000 and accepting gratification of RM6,500,000 in total for herself. The prosecution's team was from the onset led by Datuk Seri Gopal Sri Ram ('GSR') who retired as a judge and was now practicing as an advocate and solicitor. The prosecution succeeded in proving a *prima facie* case against the accused in respect of all the charges against her and the applicant was called to enter her defence. The applicant had, prior to the decision at the end of the prosecution's case, filed an application seeking for the production of GSR's letter of appointment to conduct the criminal prosecution for her case under ss. 376(3), 376(3A) and 379 of the Criminal Procedure Code ('CPC'). The applicant's complaint was that the respondent did not produce the *fiat* despite her request. The applicant also contended that GSR's appointment was in doubt until and unless his *fiat* was produced, as the relevant provisions in the CPC state that an advocate may only conduct a criminal prosecution if he was authorised in writing. The application was, however, dismissed. Undeterred, the applicant pursued her application *via* an appeal to the Court of Appeal. The outcome was amicable, as the prosecution consented to produce a copy of the letter of appointment for the applicant's perusal. The letter of appointment, dated 8 July 2020, was signed by the current Attorney General, Tan Sri Idrus Harun and addressed to GSR ('first written *fiat*'). It referred to GSR's appointment as a Senior Deputy Public Prosecutor ('Senior DPP') *via* a letter dated 30 August 2018 in respect of the affairs of the 1Malaysia Development Berhad ('1MDB'). The letter also stated that GSR was employed to conduct the criminal prosecution in respect of the applicant until its conclusion. The applicant filed two applications, where she sought to contest the validity of the appointment of the advocate who was appointed by the Public Prosecutor to conduct the prosecution in her case, and also to declare the trial null and void and a mistrial. The gist of the orders sought by the application in these applications were for the following declarations; (i) that GSR's appointment as the Senior DPP under the first written *fiat* was illegal, irregular and defective; (ii) that GSR's appointment could not be effected retrospectively as the first written *fiat* was done after her cases had reached the defence stage and would prejudice her; (iii) the first written *fiat* was titled 'RE: 1MDB Prosecution' and therefore not applicable for her cases; (iv) the first written *fiat* was invalid as it was signed by the current Attorney General when it should have been signed by his predecessor, Tan Sri Tommy Thomas ('TT') who was the Attorney General when she was charged; (v) that GSR had abused the court's process and was in contempt of court by conducting the prosecution's team from the onset; and (vi) that she be acquitted and discharged from all the charges. The respondent responded with, amongst others, an affidavit by TT, who was the Attorney General from 4 June 2018 until his resignation on 28 February 2020. TT averred that he was empowered as the Public Prosecutor at the

material time to appoint a 'fit and proper person' to be the Deputy Public Prosecutor ('DPP') under his 'general control and direction' under s. 376(3) of the CPC and that this provision was distinct from the appointment of an advocate and solicitor of the High Court of Malaya to conduct a single or *ad hoc* criminal prosecution under s. 379 of the CPC. TT further averred that he had personally appointed GSR as the Senior DPP under s. 376(3) of the CPC and had authorised him to conduct the prosecution of some high profile criminal cases, including the ones against the applicant ('oral *fiat*'). TT took the view that there was no requirement for GSR's appointment to be in writing, as unlike an appointment under s. 379 of the CPC (which requires it to be in writing) an appointment under s. 376(3) of the CPC does not require one, as the person appointed, would be under his 'general control and direction.' The respondent's final affidavit contained another letter of appointment dated 21 May 2021 for GSR ('second written *fiat*'). The Attorney General, in his capacity as the Public Prosecutor and *ex abundanti cautela,* had made GSR's appointment as a Senior DPP under s. 376(3) of the CPC to conduct the cases against the applicant with retrospective effect from 30 August 2018. The applicant, in response, accused the prosecution of making a turnaround in producing the second written *fiat* as this ran contrary to TT's assertion that he had orally appointed GSR under s. 376(3) of the CPC and that there was no necessity to make the appointment in writing. The applicant also averred that the fact that GSR's appointment was backdated to 30 August 2018 meant that the GSR never had the *fiat* to prosecute her case from the onset and that the prosecution's action was proof of *mala fide* towards her. Thus, the applicant contended that the proceedings in respect of her cases were void and illegal, and that the whole trial should be declared a nullity or mistrial, and that she be acquitted and discharged from all the charges.

Held (dismissing applications):

(1) The Attorney General is by virtue of s. 376(1) of the CPC the Public Prosecutor and has the control and direction of all criminal prosecutions. Section 376(3) of the CPC is intended for the appointment of prosecutors in service, particularly those under the purview of the Attorney General's office. It is also common practice that the appointments of prosecutors appointed in service are gazetted. However, the appointment of advocates under the provisions of s. 376(3) had been validated by the courts and in particular by the apex court (*Dato' Seri Anwar Ibrahim v. PP* and *Dato' Sri Mohd Najib Hj Abdul Razak v. PP*). There was no necessity for any appointment under s. 376(3) of the CPC to be gazetted. This would put to rest one of the applicant's contentions that the appointment must be gazetted. It was therefore settled that advocates could be appointed as prosecutors under s. 376(3). (paras 25 & 26)

(2) The appointment and employment of advocates as prosecutors under ss. 377(b)(1) and 379 of the CPC must be evidenced in writing. That requirement is clearly stated in these provisions. There is, however, no such requirement under s. 376(3) of the CPC, for it merely states that the Public Prosecutor may appoint any 'fit and proper person' to be a Deputy Public Prosecutor or Senior Deputy Public Prosecutor. TT had averred that he appointed GSR as Senior Deputy Public Prosecutor on 30 August 2018 under s. 376(3) of the CPC to handle the prosecutions of the 1MDB cases and that he had subsequently instructed GSR to conduct the prosecution for the cases against the applicant. TT took the view that there was no necessity for GSR's appointment to be in writing as it was made under s. 376(3) of the CPC. (para 27)

(3) Section 376(3) is distinct from ss. 377 and 379 of the CPC. Section 376(3) enables the Public Prosecutor to appoint any person that he deems to be 'fit and proper' to be a Deputy or Senior DPP who will be under his general control and direction. It essentially gives the Public Prosecutor *carte blanche* for the appointment as he is not confined to the list of persons set out under s. 377 or advocates under s. 379 of the CPC. It is erroneous to suggest that the appointment under s. 376(3) of the CPC must be in writing when there is no express requirement in that section, unlike ss. 377 and 379. (para 30)

(4) It is public knowledge that GSR had been conducting the prosecution against the applicant from the onset at the High Court, and he did so with a team of prosecutors from the Attorney General's Chambers. It defied belief that GSR could do so without the knowledge and sanction of TT being the Attorney General/Public Prosecutor then and also the current Attorney General. The provisions under ss. 376(3), 377, 378 and 379 of the CPC must be viewed holistically. They are meant to ensure that the conduct of any criminal prosecution remained under the purview and control of the Public Prosecutor as envisaged under art. 145(3) of the Federal Constitution. (para 31)

(5) The authorisation given by TT to GSR to conduct the criminal prosecution in the applicant's cases was without doubt validly done under s. 376(3) of the CPC in his capacity as the Public Prosecutor. This authorisation need not be evidenced in writing. The applicant's accusation of TT lying was without basis. The fact that TT had in his book "Justice in the wilderness" mentioned that he had appointed GSR to conduct the prosecution for the 1MDB cases but made no mention of her cases did not mean that he had not done so. It was his prerogative on what to include in his book. As for the first written *fiat*, TT had stated that he had no knowledge of it, which was not remarkable as it was issued by his successor and that he was no longer involved with the

affairs of the Attorney General. That did not dilute the fact that he had appointed GSR when he was in office. That statement was based on his knowledge and there was no reason to doubt the veracity of TT's averment. (para 32)

(6) There was no necessity to address the validity of the first written *fiat* or GSR's appointment under it which was the essence of the applicant's application. They have ceased to become a moot point as GSR's appointment by TT under s. 376(3) of the CPC was valid. There was no necessity for the first nor the second written *fiat* to be issued. It followed that the applicant's applications for a declaration on, amongst others, the validity of the first written *fiat*, GSR's appointment as a Senior DPP and for the trial to be declared a nullity, must fail. (para 34)

(7) The Public Prosecutor, being an authority empowered to appoint a person to exercise a function, as spelt out under s. 50 of the Interpretation Acts 1948 and 1967 ('Act'), is entitled to make GSR's appointment with retrospective effect as set out under s. 50(b) of this Act. It was not for the courts to question the validity of an Act that confers the power to act retrospectively. (para 38)

Case(s) referred to:
Ang Theam Choom v. PP [2002] 4 CLJ 538 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2014] 1 CLJ 289 FC ***(refd)***
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 1 LNS 1837 CA ***(refd)***
Dato' Sri Mohd Najib Hj Abdul Razak v. PP (Criminal Application No. WA-44-211-12-2018) (Unreported) ***(refd)***
Loh Kooi Choon v. Government Of Malaysia [1975] 1 LNS 90 FC ***(refd)***
Mohd Najib Hj Abd Razak v. PP [2019] 4 CLJ 514 HC ***(refd)***
PP v. Dato' Sri Mohd Najib Hj Abdul Razak [2019] 8 CLJ 313 FC ***(refd)***
Quek Gin Hong v. PP [1998] 4 CLJ Supp 515 HC ***(refd)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 HC ***(refd)***
Rosmah Mansor v. PP [2020] 1 LNS 963 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 376(3), (3A), 377, 378, 379
Federal Constitution, art. 145(3)
Interpretation Acts 1948 and 1967, s. 50(b)
Malaysian Anti-Corruption Commission Act 2009, s. 16(a)(A)

For the applicant - Jagjit Singh, Akberdin Abdul Kader, Azrul Zulkifli Stork, Ummi Kartini Abd Latif & Meor Hafiz Salehan; M/s Akberdin & Co, M/s Jagjit Singh & Co & M/s Azharudin & Assocs
For the respondent - Gopal Sri Ram, Ahmad Akram Gharib, Mohamad Mustaffa P Kunyalam, Poh Yih Tinn & Fariza Azman; DPPs

Reported by Suhainah Wahiduddin

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JUDGMENT

Mohamed Zaini Mazlan J:

Introduction

[1] The applicant faced several criminal charges. The trial proceeded and had been concluded at the prosecution's stage. The applicant was called to enter her defence as the prosecution had succeeded in proving a *prima facie* case against her.

[2] The applicant had prior to the commencement of the defence stage filed these two applications, where she sought to contest the validity of the appointment of the advocate who was appointed by the Public Prosecutor to conduct the prosecution in her case, and also to declare the trial null and void and a mistrial. She is also seeking to be acquitted and discharged arising from the declarations sought.

Background

[3] The applicant is facing three charges under s. 16(a)(A) of the Malaysian Anti-Corruption Commission Act 2009 in Criminal Trial No. WA-45-9-03-2019 and WA-45-19-07-2019 at the Kuala Lumpur High Court. She is charged for soliciting RM187,500,000, and accepting gratification of RM6,500,000 in total for herself. These were concerning the Education Ministry's RM1.25 billion contract for Sarawak's rural schools' solar hybrid power system and the operation and maintenance of Genset/Diesel project. The trial commenced on 6 February 2020 and would have proceeded seamlessly if not for the restrictions imposed by a few "movement control orders" by the Government to stem the onslaught of the Covid-19 pandemic. The prosecution's team was from the onset led by Datuk Seri Gopal Sri Ram ("GSR"), who retired as a judge in the Federal Court in 2010, and now practices as an advocate and solicitor.

[4] The prosecution concluded its case after 35 days of trial. 23 witnesses had testified for the prosecution. The prosecution succeeded in proving a *prima facie* case against the accused in respect of all the charges against her. The applicant was called to enter her defence. The trial dates for the defence stage had also been fixed.

[5] The applicant had prior to the decision at the end of the prosecution's case filed an application seeking for the production of GSR's letter of appointment to conduct the criminal prosecution for her case under ss. 376(3), 376(3A) and 379 of the Criminal Procedure Code ("CPC"), it was filed on 8 July 2020. The applicant's complaint was that the respondent did not produce the *fiat* despite her request. The applicant contended that the legality of GSR conducting the prosecution rests on the *fiat*. The applicant also contended that GSR's appointment was in doubt until and unless his *fiat* was produced, as the relevant provisions in the CPC state that an advocate may only conduct a criminal prosecution if he was authorised in writing.

[6] The application was however dismissed on 19 August 2020 (see *Rosmah Mansor v. PP* [2020] 1 LNS 963, [2020] MLJU 1197 (HC)). The applicant was undeterred and pursued her application *via* an appeal to the Court of Appeal, who heard her appeal on 8 April 2021. The outcome was amicable, as the prosecution consented to produce a copy of the letter of appointment for the applicant's perusal.

[7] The letter of appointment dated 8 July 2020 was signed by the current Attorney General, Tan Sri Idrus bin Harun and addressed to GSR ("the first written *fiat*"). It referred to GSR's appointment as a Senior Deputy Public Prosecutor ("Senior DPP") *via* a letter dated 30 August 2018 in respect of the affairs of the 1 Malaysia Development Bhd ("1MDB"). The letter also stated that GSR is employed to conduct the criminal prosecution in respect of the applicant until its conclusion.

The Applications

[8] The contents of the first written *fiat* precipitated these two applications. The majority of the orders sought in these two applications are similar and overlapping. They could have been made in just one application. The gist of the orders sought by the applicant in these two applications are for the following declarations:

(i) that GSR's appointment as the Senior DPP under the first written *fiat* was illegal, irregular and defective;

(ii) that GSR's appointment could not be effected retrospectively as the first written *fiat* was done after her cases had reached the defence stage and would prejudice her;

(iii) the first written *fiat* was titled "Re: 1MDB Prosecution" and therefore not applicable for her cases;

(iv) the first written *fiat* is invalid as it was signed by the current Attorney General when it should have been signed by his predecessor, Tan Sri Tommy Thomas ("TT"), who was the Attorney General when she was charged;

(v) that GSR had abused the court's process and is in contempt of court by conducting the prosecution's team from the onset; and

(vi) that the proceedings against her were null and void and a mistrial, and that she be acquitted and discharged from all the charges.

[9] The respondent responded with amongst others an affidavit by TT. He had been the Attorney General from 4 June 2018 until his resignation on 28 February 2020. TT averred that he was empowered as the Public Prosecutor at the material time to appoint a "fit and proper person" to be the Deputy Public Prosecutor ("DPP") under his "general control and direction" under s. 376(3) of the CPC and that this provision is distinct from the appointment of an advocate and solicitor of the High Court of Malaya

to conduct a single or *ad hoc* criminal prosecution under s. 379 of the CPC. TT further averred that he had personally appointed GSR as the Senior DPP under s. 376(3) of the CPC and had authorised him to conduct the prosecution of some high profile criminal cases, including the ones against the applicant ("oral *fiat*"). TT took the view that there was no requirement for GSR's appointment to be in writing, as unlike an appointment under s. 379 of the CPC (which requires it to be in writing), an appointment under s. 376(3) of the CPC does not require one, as the person appointed, in the words of the section itself, would be under his "general control and direction" as the Public Prosecutor. TT also highlighted that GSR had been leading the prosecution's team from the onset and that it was public knowledge being a high profile case. He contended that it would be incredulous for GSR to conduct the prosecution's case with a team of prosecutors from the Attorney General's Chambers without his sanction.

[10] TT also pointed out that this was not the first time that GSR's appointment as a Senior DPP had been challenged, as the accused in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* (Criminal Application No. WA-44-211-12-2018), had also mounted a similar challenge, and that the application had been dismissed at all levels, ending at the apex court.

[11] The applicant heaped scorn on TT's averment. She did not mince her words by accusing TT of blatantly lying as there would have been no necessity for his successor to produce the first written *fiat* if there was any truth to his version. The applicant had also referred to an extract of a book written by TT with the title "*Justice In The Wilderness*", and cited the following passage in the book:

> I appointed Sri Ram, under Section 376(3), to deal with the investigation and prosecution of 1MDB matters.

She pointed out that TT had merely mentioned GSR's appointment for the 1MDB matters and never once mentioned that his appointment was also for her cases. TT in response stated that he had no knowledge about the first written *fiat* and maintained that GSR's appointment was through the oral *fiat*.

[12] The respondent's final affidavit was concise, but it contained yet another letter of appointment dated 21 May 2021 for GSR ("the second written *fiat*"). The Honourable Attorney General, in his capacity as the Public Prosecutor and *ex abundanti cautela* has made GSR's appointment as a Senior DPP under s. 376(3) of the CPC to conduct the cases against the applicant with retrospective effect from 30 August 2018. The contents are as follows:

Appointment as Senior Deputy Public Prosecutor under Section 376(3) of the Criminal Procedure Code

IN exercise of the powers conferred upon me as Public Prosecutor under section 376(3) of the Criminal Procedure Code [Act 593], I, Tan Sri Idrus bin Harun, Public Prosecutor, hereby appoint Datuk Seri Gopal Sri Ram to be Deputy Public Prosecutor and designate the appointment as Senior Deputy Public Prosecutor with effect from 30th August 2018 to exercise all or any of the rights and powers vested in or exercisable by me or by under the Criminal Procedure Code [Act 593] or any other written law as provided under section 376(3) of the Criminal Procedure Code [Act 593] and specifically to conduct the prosecution in *PP v. Datin Seri Rosmah binti Mansor* (Kuala Lumpur High Court Criminal Case No. WA-45-9-03-2019; Kuala Lumpur Sessions Court Criminal Case No. WA-62R-54-11-2018) and *PP v. Datin Seri Rosmah binti Mansor* (Kuala Lumpur High Court Criminal Case No. WA-45-19-07-2019; Kuala Lumpur Sessions Court Criminal Case No. WA-62R-18-04-2019) including any other criminal applications and appeals related thereto.

[13] I must highlight that this final affidavit by the prosecution was filed amid the hearing of these applications, as they were heard over a span of two days. The applicant's learned counsel had objected to the admissibility of this affidavit. I had allowed it to be referred to during the hearing and gave liberty to the applicant to file her affidavit-in-reply. I am allowing this affidavit to be admitted, as the applicant had been given the liberty to file her affidavit in response, which she duly did. I also find that learned counsel for the applicant had ably submitted on the issue of the second written *fiat* during the hearing. I am convinced that the applicant had not suffered any substantial prejudice.

[14] The applicant had in her affidavit in response accused the prosecution of making a "U-turn" (turn around would be a more apt description) in producing the second written *fiat*, as this runs contrary to TT's assertion that he had orally appointed GSR under s. 376(3) of the CPC and that there was no necessity to make the appointment in writing. She also averred that the fact that GSR's appointment is backdated to 30 August 2018 meant that GSR never had the *fiat* to prosecute her case from the onset and that the prosecution's action is proof of *mala fide* towards her. She also contended that TT's version of GSR's appointment must be taken as a lie as there would have been no necessity to issue the first and second written *fiat* letters of appointment by the Public Prosecutor if that was indeed the case.

The Applicant's Grounds

[15] It is common ground that GSR was appointed under s. 376(3) of the CPC. Although this section makes no mention of the necessity for the appointment to be in writing, learned counsel for the applicant submitted that s. 376(3) must be read together with ss. 377 and 379 of the CPC, which

meant that as an advocate, his appointment could not be merely done orally, as both ss. 377 and 379 of the CPC stipulate that the appointment of any advocate to conduct a criminal prosecution must be evidenced in writing.

[16] The Federal Court's decision in *PP v. Dato' Sri Mohd Najib Hj Abdul Razak* [2019] 8 CLJ 313 (FC) was submitted in support, where the following passage was cited:

> [9] It is also undisputed that the Appellant, being the Public Prosecutor, possess the sole constitutional power to institute and conduct prosecution of all criminal cases in the country. With that power, the Appellant also has the power under Section 379 of the CPC to appoint a private practitioner to conduct criminal prosecution on his behalf. **This appointment is manifested in the letter of appointment of Datuk Haji Sulaiman.** (emphasis added)

[17] Learned counsel for the applicant also referred to the Federal Court's decision in *Dato' Seri Anwar Ibrahim v. PP* [2014] 1 CLJ 289 (FC), and submitted that the apex court held that these three sections must be read conjunctively and that they complement each other. The following passage by Raus Sharif PCA (later CJ) was cited in support:

> [7] We are in agreement with the approach taken by the Court of Appeal in rejecting Encik Karpal Singh's reading of s. 378 of the CPC. We are of the same view with the Court of Appeal that s. 378 must not be read in isolation. It must be read together with s. 376(3) and s. 379. These two latter provisions are in our view complementary. And the two provisions clearly give the Public Prosecutor the authority to employ an advocate and in this case, Tan Sri Shafee, to conduct the appeal in Rayuan Jenayah No. W-05-19-01-2012. Hence, we see no merit on the first issue raised by Encik Karpal Singh.

[18] Learned counsel for the applicant submitted that the first written *fiat* was issued well after the proceedings against the applicant had commenced, in fact after the prosecution's case had ended and the defence called. It was contended that the written *fiat* should have been issued before the trial began. The case of *Ang Theam Choom v. PP* [2002] 4 CLJ 538 (CA) was cited in support. The appellate court, in that case, held that the authority to act is sufficient so long as it was given before the trial commenced, as it is at the trial stage that one conducts the prosecution.

[19] It was also argued that the first written *fiat* was an afterthought, as it was only prepared after the applicant had filed her application for its production. Learned counsel also submitted the fact that the first written *fiat* was signed and issued by the current Attorney General and not by his predecessor TT, who was the Attorney General when proceedings against her began, lends force to their contention that the first written *fiat* was an afterthought.

[20] Learned counsel for the applicant also contended that the fact that the Attorney General had issued the first and second written *fiat* could only mean that GSR was never duly-appointed under s. 376(3) of the CPC as alleged by TT, as there would have been no necessity to issue any *fiat* in writing if that was indeed the case. It was submitted that the prosecution's conduct had been inconsistent, suggesting an attempt to cover up the deficiencies in GSR's appointment.

[21] In the upshot, the applicant contended that the proceedings in respect of her cases were void and illegal, and that the whole trial should be declared a nullity or mistrial, and that she be acquitted and discharged from all the charges.

Findings

[22] The respondent had sought to rely on the failure of the applicant's challenge to GSR's appointment in the *Dato' Sri Mohd Najib v. PP* case (*supra*) and submitted that the conclusion reached in that case should end any doubt on the veracity of GSR's appointment in this case. I am unable to agree with that proposition simply for the fact that GSR's appointment, in that case, was specifically for the prosecution against Dato' Sri Najib. This fact is apparent from a reading of the judgments of Justice Collin Lawrence Sequerah at the High Court (see *Mohd Najib Hj Abd Razak v. PP* [2019] 4 CLJ 514) and the Court of Appeal's (see *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 1 LNS 1837). The validation of GSR's appointment as the Senior DPP for that case could not be transposed to the cases against the applicant.

[23] I have not lost sight of the fact that the focus of the applicant's applications is on the first written *fiat*. I will however address the applicant's arguments on the oral *fiat* by TT first, as it is very relevant to the first written *fiat*. The applicant contended that s. 376(3) of the CPC must be read together with ss. 377 and 379 of the CPC. The essence of that proposition is that GSR's appointment by TT, which the latter contended was made orally under s. 376(3) of the CPC, would still be required to be made in writing, and that the absence of it meant that the appointment is invalid.

[24] Sections 376(3), 377 and 379 of the CPC, are as follows:

Public Prosecutor

376(1) ...

(2) ...

(3) The Public Prosecutor may appoint a fit and proper person to be Deputy Public Prosecutor who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally and he may designate any of such Public Prosecutors as Senior Deputy Public Prosecutors.

(3A) ...

(4) ...

Conduct of prosecutions in Court

377. Every criminal prosecution before any Court and every inquiry before a Magistrate shall, subject to the following sections, be conducted:

(a) ...

(b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorised in writing by the Public Prosecutor:

(1) an advocate;

(2) ...

(3) ...

(4) ...

(5) ...

(6) ...

Provided that in any district in which it may be impracticable, without an unreasonable amount of delay or expense, that such prosecutions or inquiries should be so conducted it shall be lawful for the Public Prosecutor from time to time, by notification in the *Gazette,* to direct that prosecutions maybe conducted in that district by a police officer below the rank of Inspector.

Employment of advocate

379. With the permission in writing of the Public Prosecutor an advocate may be employed on behalf of the Government to conduct any criminal prosecution or inquiry, or to appeal on any criminal appeal or point of law reserved on behalf of the Public Prosecutor. The advocate shall be paid out of the public funds such remuneration as may be sanctioned by the Minister of Finance and while conducting such prosecution or inquiry, or appearing on such criminal appeal or point of law reserved, shall be deemed to be a "public servant".

[25] The Attorney General is by virtue of s. 376(1) of the CPC the Public Prosecutor and has the control and direction of all criminal prosecutions. My first impression of s. 376(3) of the CPC was that it was intended for the appointment of prosecutors in service, particularly those under the purview of the Attorney General's office. It is also common practice that the appointments of prosecutors appointed in service are gazetted. However, the appointment of advocates under the provisions of s. 376(3) has been validated by the courts, and in particular by the apex court; see *Dato' Seri Anwar Ibrahim v. PP* (*supra*). The Court of Appeal had also recently in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 1 LNS 1837; [2019] 5 MLJ 623 (CA) held the same:

[49] In addition, there is nothing in s. 376(3) of the CPC that limits the power of the Public Prosecutor to appoint DPPs only amongst the judicial and legal officers. The Public Prosecutor has the discretion to appoint fit and proper persons to do the job. In *Dato' Seri Anwar bin Ibrahim v. Pendakwa Raya* [2014] MLJU 1876; [2014] 4 MLRA 420 at 421, it was held by this court as follows:

> (3) The prosecutorial discretion to regulate the conduct of prosecution is the constitutional prerogative of the Public Prosecutor. The appointment of Shafee was at the sole discretion of the Public Prosecutor and no other body including the Bar Council could usurp that prerogative vested in the Public Prosecutor.

Therefore there is no issue that the appointment of GSR is valid and legal.

[26] The appellate court had also held that there was no necessity for any appointment under s. 376(3) of the CPC to be gazetted (see para. 47b at p. 641). This will put to rest one of the applicant's contentions that the appointment must be gazetted. It is therefore settled that advocates can be appointed as prosecutors under s. 376(3).

[27] The appointment and employment of advocates as prosecutors under ss. 377(b)(1) and 379 of the CPC must be evidenced in writing. That requirement is clearly stated in these provisions. There is however no such requirement under s. 376(3) of the CPC, for it merely states that the Public Prosecutor may appoint any "fit and proper person" to be a DPP or Senior DPP. TT had averred that he appointed GSR as Senior DPP on 30 August 2018 under s. 376(3) of the CPC to handle the prosecutions of the 1MDB cases and that he had subsequently instructed GSR to conduct the prosecution for the cases against the applicant. TT took the view that there was no necessity for GSR's appointment to be in writing as it was made under s. 376(3) of the CPC.

[28] The applicant's contention that s. 376(3) must be read together with ss. 377 and 379 is premised on firstly the Federal Court's judgments in *Dato' Sri Mohd Najib v. PP* (*supr*a). I am unable to appreciate the relevance of that case, as the appointment of the advocate concerned was made under s. 379 of the CPC which is required to be made in writing. The appointment of the advocate concerned was indeed evidenced in writing. It is not authority for the proposition that the appointment under s. 376(3) needs to be in writing.

[29] The applicant also referred to the Federal Court's decision in *Dato' Seri Anwar Ibrahim v. PP* [2014] 1 CLJ 289 (FC) to lend force to her contention that these three sections must be read conjunctively, in that case, the challenge mounted against the advocate concerned pertained to him conducting the appeal for the prosecution under s. 378 of the CPC. It was contended that no advocate can appear for the prosecution in a criminal

appeal and that s. 378 only provides for the Public Prosecutor, a Senior DPP and a DPP to conduct the appeal. The Federal Court in its judgment did not state that s. 376(3) must be read together with s. 379. What the apex court meant was that s. 378 must not be read in isolation, as an advocate can be appointed to be a prosecutor exercising the powers that are vested in the Public Prosecutor under ss. 376(3) and 379. The advocate appointed under these sections could then appear on behalf of the Public Prosecutor in the capacity of a Senior DPP or DPP, in a criminal appeal as stipulated under s. 378 of the CPC.

[30] Section 376(3) is distinct from ss. 377 and 379. Section 376(3) enables the Public Prosecutor to appoint any person that he deems to be "fit and proper" to be a DPP or Senior DPP who will be under his general control and direction. It essentially gives the Public Prosecutor *carte blanche* for the appointment as he is not confined to the list of persons set out under s. 377 or advocates under s. 379 of the CPC. It is erroneous to suggest that the appointment under s. 376(3) of the CPC must be in writing when there is no express requirement in that section, unlike ss. 377 and 379 of the CPC. The Court of Appeal in *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* (*supra*) had the occasion to address this very same issue:

> [45] We noted that the fact of appointment of GSR under section 376(3) CPC is never in doubt, as counsel had sight of the same.
>
> [46] Hence we do not see the basis of the application for the production of the said LOA. **Section 376(3) of the CPC does not require that the appointment be made in writing.** Thus, in the absence of the requirement of the appointment to be made in writing, it is a matter of course that the section does not provide for the LOA to be produced upon demand. It is not for the Courts to read and impose procedural requirements into the provisions to rule a non-compliance. This is reading something into the provision which is not there in the first place. The section is unambiguous. The Federal Court case of *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914 has stated that:
>
> > ... it is not for the Courts to create procedural requirements because it is not the function of the Courts to make law or rules. If there are no such procedural requirements then there cannot be non-compliance thereof. Only if there is that, there can be non-compliance thereof and only then the Courts should consider whether, on the facts, there has been non-compliance.
> >
> > (emphasis added)

[31] TT had clearly stated that he had after appointing GSR to lead the prosecution in the 1MDB cases subsequently authorised him to conduct the prosecution for the criminal cases against the applicant. It is public knowledge that GSR had been conducting the prosecution against the applicant from the onset at the High Court, and he did so with a team of prosecutors from the Attorney General's Chambers. It defies belief that GSR

could do so without the knowledge and sanction of TT being the Attorney General/Public Prosecutor then and also the current Attorney General. In my view, the provisions under ss. 376(3), 377, 378 and 379 of the CPC must be viewed holistically. They are meant to ensure that the conduct of any criminal prosecution remains under the purview and control of the Public Prosecutor as envisaged under art. 145(3) of the Federal Constitution. The numerous cases referred to by learned counsel for the applicant on the disqualification of the prosecutors concerned and the invalidation of the proceedings where they were involved were mainly on the constitutionality of the Act concerned (for instance *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740 and *Quek Gin Hong v. PP* [1998] 4 CLJ Supp 515), or where the Public Prosecutor was not even aware of the prosecution instituted by another Government agency (see *Quek Gin Hong v. PP* [1998] 4 CLJ Supp 515).

[32] I believe that the authorisation given by TT to GSR to conduct the criminal prosecution in the applicant's cases was without doubt validly done under s. 376(3) of the CPC in his capacity as the Public Prosecutor. I am resolute that this authorisation need not be evidenced in writing. The applicant's accusation of TT lying is without basis. The fact that TT had in his book mentioned that he had appointed GSR to conduct the prosecution for the 1MDB cases but made no mention of her cases does not mean that he has not done so. It is his prerogative on what to include in his book. As for the first written *fiat*, TT had in his affidavit-in-reply stated that he has no knowledge of it, which is not remarkable as it was issued by his successor and that he was no longer involved with the affairs of the Attorney General. That does not dilute the fact that he had appointed GSR when he was in office. That statement is based on his knowledge. I see no reason to doubt the veracity of TT's averment.

[33] As I have noted earlier, 1 am mindful of the intent of the applicant's application. The thrust of her applications is on the first written *fiat*. In challenging this *fiat*, the applicant is seeking to invalidate GSR's appointment as the Senior DPP to conduct the prosecution in her cases, and consequently, to have the trial declared null and void. That is the intent of the applicant's applications.

[34] I therefore see no necessity to address the validity of the first written *fiat* or GSR's appointment under it which are the essence of the applicant's application. They have ceased to become a moot point as I have found GSR's appointment by TT under s. 376(3) of the CPC to be valid. In my view, there is no necessity for the first nor the second written *fiat* to be issued. It follows that the applicant's applications for a declaration on amongst others the validity of the first written *fiat*, GSR's appointment as a Senior DPP and for the trial to be declared a nullity must fail.

[35] I take cognisance of the fact that the respondent had issued the second written *fiat* out of an abundance of caution.

[36] As for the second written *fiat* which was issued *ex abundanti cautela* by the Public Prosecutor, I too in a similar vein will briefly discuss it. It struck me that the second written *fiat* was issued to allay the applicant's complaint on GSR's appointment. I accept that it was issued as an added precaution in the event that I am disinclined to accept either TT's version on GSR's appointment or the first written *fiat*. The pertinent issue is whether GSR's appointment can be retrospective.

[37] It was submitted by the prosecution that the Public Prosecutor is entitled to make the appointment retrospective under s. 50(b) of the Interpretation Acts 1948 and 1967. The section reads as follows:

> **50. Appointment may be made by office and with retrospective effect**
>
> Where under any written law the Yang di-Pertuan Agong, a State Authority, a Minister or any other authority is empowered to appoint a person to exercise any function, to be a member of any board, commission or similar body or to be or do any other thing, he may:
>
> (a) instead of appointing a person by name, appoint the holder of an office by the term designating the office; and
>
> (b) if he thinks fit, make the appointment with retrospective effect to a date not earlier than the commencement of the law under which it is made.

[38] I am inclined to agree with the prosecution's proposition that the Public Prosecutor, being an authority empowered to appoint a person to exercise a function, as spelt out under s. 50 of the Act, is entitled to make GSR's appointment with retrospective effect as set out under s. 50(b) of this Act. It is not for the courts to question the validity of an Act that confers the power to act retrospectively. Raja Azlan Shah FJ (as he then was) in *Loh Kooi Choon v. Government Of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 held:

> It cannot be gainsaid that Parliament is endowed with plenary powers of legislation and that it is within the ambit of its competence to legislate with prospective or retrospective effect Retrospective legislation is one of the incidents of plenary legislative powers and as such is not required to be spelt out in the Constitution ...
>
> If such was the intention that the Act was to be given retrospective effect even in respect of substantive right or pending proceeding, the courts have no alternative but to give effect to the Act even though the consequences might appear harsh and unjust.

[39] The applicant's applications are therefore dismissed.